

Chapter 7: Procurement and Third Party Contract Management

Procurement Options Through the State of Kentucky

Each step of the procurement process must be reviewed and approved by OTD before the subrecipient can proceed with the next step. OTD will have final approval on the quote/bid/proposal award.

I. METHODS OF PROCUREMENT CAPITAL PURCHASES

Reference FTA Circular 4220.1F

As a one-time submission, subrecipients will submit their Board/Commission-approved Procurement Procedures and any revisions thereafter. OTD will review and approve for compliance with Federal procurement regulations and State law (KRS 45.A).

- A. Procurement by Small Purchases.** Small purchase procedures are those simple and informal procurement methods that are used to secure services, supplies, or other property that do not cost more than \$ 20,000 (state maximum-KRS 45.385A) or ~~\$100,000~~ \$150,000 (federal maximum).
- B. Procurement by Sealed Bids.** Contracting party shall solicit all bids publicly and shall award a firm-fixed-price contract to the responsible bidder whose bid is the lowest in price.
1. The following conditions should be present:
 - a) A complete, adequate, and realistic specification or purchase description is available;
 - b) Two or more responsible bidders are bidding and able to compete effectively for the business;
 - c) Price is the basis for awarding a fixed-price contract.
 2. The following requirements apply:
 - a) The invitation for bids will be publicly advertised and bids shall be solicited from at least ~~three~~ two but three are encouraged to known suppliers;
 - b) The invitation for bids shall define the items or services sought;

- c) All bids will be publicly opened at the time and place announced in the invitation to bid;
- d) A fixed-price contract award will be made in writing to the lowest responsible bidder; and
- e) Contracting party shall reject any bid if there is a sound documented reason.

C. *Procurement by competitive proposal.* Contracting party shall use this procedure when conditions are not appropriate for the use of sealed bids. The following requirements apply:

1. Requests for Proposals (RFP) will be publicized and all evaluation factors and their relative importance will be identified;
2. Proposals will be solicited from at least three qualified sources;
3. The KYTC/OTD and recipient will have a written procedure for conducting technical evaluation of the proposals received and for selecting the firm;
4. A firm, whose proposal is most advantageous to the KYTC/OTD or recipient's program, will receive an award.

D. Architectural Engineering (A&E) Services and Other Services. FTA's enabling legislation at 49 U.S.C. Section 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the "Brooks Act," 40 U.S.C. Sections 1101 through 1104, to acquire A&E services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping and related services. The nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor, determine whether qualifications-based procurement procedures may be used as described below.

- a) **Qualifications-Based Procurement Procedures Required.** The recipient must use qualifications-based procurement procedures not only when contracting for A&E services, but also for other services listed in 49 U.S.C. Section 5325(b)(1) that are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property. For example, a contractor performing program management, project design, construction management, or engineering services in which that contractor would select the finished products to be acquired for an FTA assisted construction project must be selected through qualifications-based procurement procedures.
- b) **Qualifications-Based Procurement Procedures Prohibited.** Unless FTA determines otherwise in writing, a recipient may not use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. Even if a contractor has performed services listed herein in support of a construction, alteration, or repair project involving real property, selection of that contractor to perform

similar services not relating to construction may not be made through the use of qualifications-based procurement procedures.

A project involving construction does not always require that qualifications-based procurement procedures be used. Whether or not qualifications-based procurement procedures may be used depends on the actual services to be performed in connection with the construction project. For example, the design or fabrication of message signs, signals, movable barriers, and similar property that will become off-the-shelf items or will be fabricated and delivered as final end products for installation in an FTA assisted construction project are not services for which qualifications-based procurement procedures may be used. Nor is actual construction, alteration, or repair to real property the type of services for which qualifications-based procurement procedures may be used.

c) Qualifications-Based Procurement Procedures. The following procedures apply to qualifications-based procurements:

1. Qualifications. Unlike other two-step procurement procedures in which price is an evaluation factor, an offeror's qualifications are evaluated to determine contract award.
2. Price. Price is excluded as an evaluation factor.
3. Most Qualified. Negotiations are first conducted with only the most qualified offeror.
4. Next Most Qualified. Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.
5. Effect of State Laws. To the extent that a State has, before August 10, 2005, adopted by law, an equivalent State qualifications-based-procurement requirement for acquiring architectural, engineering, and design services, State procedures, rather than Federal "Brooks Act" procedures (40 U.S.C. Sections 1101 through 1104), may be used.

E. Procurement by Noncompetitive Negotiation (sole source).

1. Procurement by noncompetitive negotiation is permissible only when the award of a contract is unfeasible under small purchase procedures, sealed bids, or competitive proposal and at least one of the following circumstances applies:
 - a) The item is available only from a single source;
 - b) A public emergency exists that will not permit a delay resulting from competitive solicitation,
 - c) FTA authorizes noncompetitive negotiations;
 - ~~d) After solicitation of a number of sources, competition is determined inadequate;~~
 - ~~e) The item is an associated capital maintenance item~~

Sole Source. When the recipient requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, the recipient may make a sole source award. When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.

- a. Unique Capability or Availability. The property or services are available from one source if one of the conditions described below is present:
 - i. Unique or Innovative Concept. The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and has not in the past been available to the recipient from another source.
 - ii. Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
 - iii. Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
 - iv. Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- b. Single Bid or Single Proposal. Upon receiving a single bid or single proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.
 - i. Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. Many unrelated factors beyond the recipient's control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA's competition requirements will be fulfilled, and the procurement will qualify as a valid competitive award.
 - ii. Inadequate Competition. FTA acknowledges competition to be inadequate when, caused by conditions within the recipient's control. For example, if the specifications used

were within the recipient's control and those specifications were unduly restrictive, competition will be inadequate.

Unusual and Compelling Urgency. The Common Grant Rule for governmental recipients permits the recipient to limit the number of sources from which it solicits bids or proposals when a recipient has such an unusual and urgent need for the property or services that the recipient would be seriously injured unless it were permitted to limit the solicitation. The recipient may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the property or services.

Associated Capital Maintenance Item Exception Repealed. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) repealed the special procurement preference previously authorized for associated capital maintenance items. Thus, any sole source procurement of associated capital maintenance items must qualify for an exception under the same standards that would apply to other sole source acquisitions.

F. Contracting with Small and Minority Firms, Women Business Enterprises, and Labor

Surplus Areas.

1. The KYTC/OTD and recipient will take all necessary affirmative steps to assure the use of minority firms, women business enterprises, **small business firms** and labor surplus area firms when possible. These steps include:
 - a) Placing qualified small and minority businesses and women business enterprises on solicitation lists;
 - b) Assuring that small and minority businesses and women business enterprises are solicited whenever they are potential sources;
 - c) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business and women business enterprises;
 - d) Establishing delivery schedules, where the requirement permits, that encourage participation by small and minority business and women's business enterprises;
 - e) Use and assistance of the Small Business Administration, the Minority Business Development Agency of the Department of Commerce; and requiring the prime contractor to take affirmative action steps.
 - f) **Maintaining a bidders list in compliance with 49 CFR Part 26.**

- G. Contract Cost and Price.** The KYTC/OTD or recipient must perform a cost or price analysis in connection with every procurement action **including change orders/contract modifications, and sole source procurements** to include making independent estimates before receiving bids or proposals.
- H. Pre-Award and Post Delivery Audit Certifications (49 CFR Part 663).** For rolling stock purchases, the sub-recipient conducts a pre-award and post-delivery audit to assure compliance with its bid specifications, Buy America, and Federal Motor Vehicle Safety requirements. Forms are included in Appendix D, Standardized Vehicle Specifications. In order to make the pre-award and post delivery audit certifications, the sub-recipient reviews and keeps on file the following information:
1. Documentation provided by the manufacturer as to the cost of the components and any sub-components of the rolling stock, their country of origin and the location of final assembly and the activities that will take place at the location;
 2. Information that the rolling stock is the same product described in the manufacturer with the capability to produce a vehicle that meets the specifications; and,
 3. A copy of the manufacturer's Federal Motor Vehicle Safety certification information as described in §663.4 or Section §663.43.
- I.** KYTC/OTD will review and concur in the bid award and vendor agreement, by requiring copies of the signed Pre-Award Audit Certifications. Recipient may not sign the vendor agreement prior to receipt of the Pre-Award Audit Certifications. As part of the review and reimbursement process upon vehicle arrival, KYTC/OTD will require copies of the signed Post-Delivery Audit Certifications.

Lobbying

Recipients of federal grants from any source exceeding \$100,000 annually must certify that they have not and will not use federally appropriated funds for lobbying. State agencies

administering 5310 and 5311 programs certify to FTA; 5310 and 5311 subrecipients certify to the state. State agencies and subrecipients must impose lobbying restrictions on their third-party contractors and must obtain certifications.

Lobbying is defined as influencing or attempting to influence an officer or employee of any Federal department or agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with obtaining a federal grant, cooperative agreement, or any other federal award.

Currently, subrecipients certify to KYTC/OTD through the grant agreements and the annual certifications and assurances. Specific contracts, grants or cooperative agreements are actions covered by the restrictions on lobbying. For example, activities such as submitting grant applications, status inquiries, and professional and technical services are not lobbying and do not need to be disclosed. Efforts to influence Federal officials about specific grants and contracts or to ask Congressional representatives for support of a particular application or bid must be disclosed. Also, lobbying restrictions do not apply to activities that might influence policy issues.

Subrecipient responsibility:

- Sign a certification of compliance pertaining to lobbying activities.
- Where third party contractors are involved, subrecipients must obtain a signed certification of compliance from the contractor.
- If non-federal funds have been used to support lobbying activities in connection with a grant from KYTC/OTD, and the subrecipient receives federal grants exceeding \$100,000, fill out a Standard Form-LLL and submit to KYTC/OTD
- If contractors receive more than \$100,000 in federal funds and use non-federal funds to support lobbying, subrecipients must obtain the completed Standard Form-LLL for the contractor and submit to KYTC/OTD.

Debarment and Suspension

To prevent fraud, waste and abuse in federal transactions, persons or entities that, by defined events or behavior, potentially threaten the integrity of federally administered programs are excluded from participation in FTA-assisted programs.

KYTC/OTD will not enter into any third-party or agreement with any party included in the "US General Service's Administration's List of Parties Excluded from Federal Procurement or Non-

procurement Programs.” This pertains to all FTA sponsored program funds. Listing of excluded parties can be located at: **Systems for Award Management (SAM)**

<https://www.sam.gov/index.html/>

Subrecipients receiving more than \$25,000 through a project from KYTC/OTD must certify they are not debarred or suspended from any Federal agency. This is accomplished through the application process and the annual certifications and assurances.

Subrecipient responsibilities:

- Sign a certification of compliance pertaining to debarment and suspension.
- Verify that a third-party contractor is not disqualified by a Federal agency **by including a snapshot of the Systems for Award Management-SAM screen showing no findings with their request for award concurrence.**
- Obtain a signed certification or add a clause or condition to the contract or subcontract regarding debarment and suspension.

Buy America Provisions/Pre-Award and Post-Delivery Audits/New Model Bus Testing

Buy America provisions are federal “domestic content” regulations. Buy America affects vehicle and equipment purchases and construction contracts valued at \$100,000 or more. It provides, with exceptions, that federal funds may not be obligated for transportation projects unless the steel and manufactured products used in them are produced in the United States.

Pre-award and post-delivery audits

Procurements for vehicles must be in accordance with “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases” (49 CFR Part 633; Federal Register March 31, 1992). The rule requires that any subrecipient who purchases rolling stock certify to the KYTC/OTD that it has conducted a pre-award and post-delivery audit to ensure compliance with its bid specifications, Buy America requirements and Federal Motor Vehicle Safety Standards.

Visual inspection and road testing are required when purchasing unmodified vans, cars, or 20 or fewer buses. Resident inspection is required when purchasing more than 20 buses or modified vans from a single manufacturer.

New model bus testing

New bus models must be tested at the FTA sponsored test facility in Altoona, PA before federal funds can be expended to purchase them. The FTA rule exempts certain vehicles from testing (usually sedans and non-modified vans). The primary purpose of the testing program is to determine the strengths and weaknesses inherent in the particular model for typical operating conditions. Ideally, subrecipients use the bus-testing report as one of the criteria used to select the vehicle for purchase.

Subrecipients purchasing equipment with federal funds are required to receive the Altoona/STURAA bus test report for each vehicle purchased and include it in procurement files if the test is required. The vendor, prior to subrecipients signing off, should provide the report on post-delivery certification forms and acceptance of the vehicle(s) from the vendor. **MAP 21 requires FTA to work with the industry to develop a pass/fail standard for bus testing. This standard must include safety standards established by FTA pursuant to Section 5329(b) (Safety).**

- **FTA must issue a rule implementing the standard by September 30, 2014. In the interim, the current bus testing process applies.**
- **Vehicles that do not receive a “pass” rating would not be eligible to be purchased with federal funds.**
- **Test results cannot be interpreted as a warranty or guarantee that the tested bus will meet the purchaser’s specific requirements.**

Subrecipient responsibility:

- Review the manufacturer's Buy America certification and supporting documentation before a contract is awarded to purchase vehicles (pre-award audit). The documentation review should include vehicle sub-components (place of origin, cost and place of final assembly).
- Subrecipients must determine to their own satisfaction that the manufacturer can meet the Buy America requirements.
- Perform a post-delivery audit after vehicles have been delivered. This post-delivery audit ensures that the manufacturer complied with Buy America, the Federal Motor Vehicle Safety Standards, and the subrecipient's specifications. Subrecipients must complete the post-delivery audits before they accept the vehicles and pay the vendor.

- Submit all documentation and certifications to Office of Transportation Delivery. Documentation must be received by the OTD prior to final payment to the subrecipient.
- Contact the KYTC/OTD for technical assistance if needed.

Reimbursement for capital items will not be made until all required documentation is submitted to KYTC/OTD and has been reviewed and approved by OTD staff.

KYTC/OTD may allow, on a case by case basis, state reimbursement simultaneous with a wire transfer to the vendor, with the coordination of the transit systems banking institution.

Purchase of Service Contracts

Subrecipients may purchase service from private sector transportation providers as well as public providers. Under such arrangements, certain special conditions apply to the purchase of service agreement. Subrecipient must ask permission in writing from KYTC/OTD to use Purchase Service Contracts. KYTC/OTD shall approve the proposed purchase of service contracts prior to execution by the subrecipient.

Vehicle Purchasing and Leasing

KYTC/OTD does not purchase vehicles directly with state or federal funds.

Subrecipients are responsible for purchasing equipment and services financed by contract award. Subrecipients may make purchases through State purchasing agreements that include the Federal Clauses; however Subrecipients must secure KYTC/OTD approval prior to using any State Price Contract or joint bid through the Kentucky Public Transit Association (KPTA). OTD reviews and approves every step of the procurement process for all KPTA joint bid packages.

Vehicles not purchased off state contract are to be procured by provider agencies using an open competitive bid process that follows federal and state procurement laws and rules. Any RFP must be reviewed by OTD prior to signing with a vendor. KYTC/OTD offers technical assistance concerning the purchase of equipment. The OTD/subrecipient are (is) responsible for protecting the state and federal interest in all equipment and facilities purchased.

If cost effective, lease agreements may be permissible, but subject to KYTC/OTD approval.

Bid Protests/Appeals

The subrecipient is responsible for settling disputes resulting from any procurement action.

Under limited circumstances, a bidder may protest to KYTC/OTD pursuant to a subrecipient's award of a contract.

FTA 3RD Party Contracting Standards

1. KYTC/OTD and the recipient must comply with Kentucky Revised Statute 45A and FTA Circular 4220.1F when entering into procurement contracts. During the procurement process, both parties shall refer and use Federal Transit Administration "Best Practices Procurement Manual dated December 18, 1998.
2. The KYTC/OTD will maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
3. The KYTC/OTD and the recipient will assure that ethical conduct is maintained by adhering to the following requirements:
 - a) The KYTC/OTD and recipient will maintain a written code of standards of conduct governing the performance of their employee engaged in the award and administration of contracts. No employee, officer, or agent of the KYTC/OTD or recipient shall participate in the selection, or in the award or administration of a contract supported by FTA funds, if a conflict of interest, real or apparent, would be involved.
 - b) The KYTC/OTD and recipient's officers, employees, or agents will neither solicit nor accept gratuities (under \$25 for the entire year), favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.
 - c) A written policy shall include procedures for identifying and preventing real and apparent organization conflicts of interest.
4. KYTC/OTD and recipient procedures will provide for a review of proposed procurement to avoid purchase of unnecessary or duplicative items.

5. To foster greater economy and efficiency, the KYTC/OTD and the recipient are encouraged to enter into state and local government agreements for procurement of use of common goods and services, if all required Federal clauses are included in the purchase agreement.
6. All FTA recipients are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property, whenever such is feasible and reduce project costs.
7. The KYTC/OTD and recipients are encouraged to use value-engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. To ensure that systematic and creative analyses of each contract item or task is at the overall lowest cost; both parties shall use value engineering.
8. The KYTC/OTD and recipient will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of proposed procurement. Both parties shall consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
9. The KYTC/OTD and recipient will maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.
10. The KYTC/OTD and recipient alone will be responsible in accordance with good administrative practice and sound business judgment for the settlement of all contractual and administrative issues arising out of procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do no relieve the KYTC/OTD or recipient of any contractual responsibility under its contracts.

11. The KYTC/OTD and recipient will have written procedures to handle and resolve protests relating to their procurement and shall, in all instances upon FTA request, disclose information regarding a protest to FTA.

B. 3RD Party Contract Competition

1. KYTC/OTD and recipient will conduct all procurement transactions in a manner providing full and open competition. Restrictive situations include, but are not limited to:

- a) Placing unreasonable requirements on firms in order for them to qualify to do business;
- b) Requiring unnecessary experience and excessive bonding;
- c) Noncompetitive pricing practices between firms or between affiliated companies;
- d) Noncompetitive awards to professionals and other consultants that are on retainer contracts;
- e) Organizational conflicts of interest;
- f) Specifying "brand name" products instead of allowing "or equal" product to be offered and describing the performance of other salient characteristics of the brand name product; and
- g) Any arbitrary action in the procurement process.

2. The KYTC/OTD and recipient will conduct procurement in a manner that prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals.

3. The KYTC/OTD and recipient will have written selection procedures for procurement transactions. The procedure must ensure that all solicitations:

- a) Incorporate a clear and accurate description of the technical requirements for the material, product, or service. Such description shall not contain features that unduly restrict competition.
- b) Identify all requirements that the offers must fulfill and all other factors used in evaluating bids or proposals.

